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JOSEPH F. SPANIOL, JR.
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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WALTER PENDLETON,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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3+PP

QUESTION PRESENTED

1. Whether O.C.G.A. § 40-6-392(b)(4) is improperly construed as creating a conclusive presumption of guilt as to a finding of a blood alcohol reading of 0.12 percent, and therefore creates a constitutionally impermissible presumption of guilt so as to violate minimum due process standards as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and which interpretation directly conflict with this Court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)?

PARTIES TO THE PROCEEDINGS

Walter Pendleton -Petitioner

State of Georgia -Respondent

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OPINION BELOW

The opinion of the Court of Appeals of the State of Georgia affirming the conviction of the trial court is reported at Pendleton v. State, 184 Ga. App. 358 (1987). It is reproduced in the Appendix, beginning at page A-1.

The order of the Supreme Court of the State of Georgia denying a petition for writ of certiorari is without opinion and is not reported. It is reproduced in the Appendix at page A-14.

JURISDICTION OF THIS COURT

This is a case involving a State Court decision of a federal question which conflicts with applicable decisions of the United States Supreme Court. The opinion of the Court of Appeals of the State of Georgia was rendered on September 8, 1987. A timely

petition for rehearing filed by the petitioner was denied by order of September 29, 1987, reproduced in the Appendix at page A-12.

A petition for writ of certiorari was filed in this case and was denied by order of the Supreme Court of the State of Georgia dated October 28, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution states as follows:

"No State shall make or enforce any law which shall . . . deprive any person

of life, liberty, or property, without due process of law . . .."

STATEMENT OF THE CASE

It has been the petitioner's contention that the trial court erred in its charge to the jury on the effect of a finding of a blood alcohol reading of 0.12 percent.

The trial court's charge explaining the presumptions codified in O.C.G.A. § 40-6-392(b)(4) instructed the jury that:

"if you find that there was 0.12 percent gram weight of alcohol in the person's blood while driving, then that in itself is no longer a presumption, but is what we -- what is called a fact -- a per se fact; that is in and of itself. It is correct and not rebuttable.

You the Jury have no authority to reject that and must accept it as a fact that the person was driving with an unlawful blood alcohol content." Trial Transcript (Tr.) 281.

On July 24, 1987, the jury returned its verdict whereby it found the Petitioner guilty of driving under the influence, driving with a blood alcohol content of .12 or greater, and failure to maintain a proper lane.

Petitioner appealed to the Court of Appeals of the State of Georgia contending among other things that the instruction was contrary to the law because it took from the jury their fact finding function by establishing a conclusive presumption which relieved the state of the burden of proving every element of

the offense beyond a reasonable doubt; in that, the trial court's instructions to the jury to find the defendant guilty of violating O.C.G.A. § 40-6-391(a)(4) if they found 0.12 percent blood alcohol content in his blood at the time he was driving completely ignores the fact that there are defenses which exist and which came out at trial and effectively negates the charge to the jury on the element of intent.

The Court of Appeals of the State of Georgia rejected this contention and affirmed the conviction of the trial court in a decision rendered on September 8, 1987 and denied a petition for rehearing on September 29, 1987.

Petitioner's application to the Supreme Court of the State of Georgia for

a writ of certiorari again contending that his due process rights were violated by the trial court's jury instruction creating a conclusive presumption of guilt was also denied.

REASON FOR GRANTING THE WRIT

The presumption created by the instruction was "conclusive", that is, not technically a presumption at all, but rather an irrebuttable direction by the court to find intent and impaired driving ability once convinced of the facts triggering the presumption.

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re

Winship, 397 U.S. 358, at 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970).

Under Georgia law every crime must be committed with the requisite intent. The Georgia trial court judge stated as such in his charge to the jury. The trial judge instructed the jury as follows:

"Intent is an essential element of any crime, and it must be proved by the State beyond a reasonable doubt." Tr. 273.

In response to the petitioner's contention that the verdict is contrary to law because the trial court failed to charge the jury on intent, the Court of Appeals stated, "we need only point out that the trial court did charge on intent". (See A-10)

However, the inclusion of the general instruction did not dissipate the constitutional infirmity of the instruction as to count two which was that if the jury found 0.12 percent by weight of alcohol then it is "not rebuttable" and they have "no authority to reject that . . . [but] must accept it as a fact that the person was driving with an unlawful blood alcohol content" in violation of OCGA § 40-6-391(a)(4).

The contradiction produced by giving the irreconcilable instructions "[could easily have led a reasonable juror to resolve] the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption." Francis v.

Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

Thus, the question before this court is whether the statutory presumptions as put forth by the trial court's instruction to the jury had the effect of relieving the state of the burden of proving every element of the crime; imparticular, the critical question of petitioner's state of mind.

In this case, if the jury found 0.12 percent blood alcohol content the jury could not rebut that and must find him guilty of driving with an unlawful blood alcohol content. The element of intent was effectively eliminated as an ingredient of the offense. Additionally, proof which tended to establish that

the Petitioner was not under the influence of alcohol was also foreclosed.

Conclusive presumptions conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, and it invades the fact finding function which in a criminal case the law assigns solely to the jury. The instructions announced to the jury in this case had exactly this consequence. Upon finding proof of 0.12 blood-alcohol content they were directed to find against the defendant on the element of intent.

The state was thus not forced to prove "beyond a reasonable doubt every fact necessary to constitute the crime charged, and the defendant was deprived

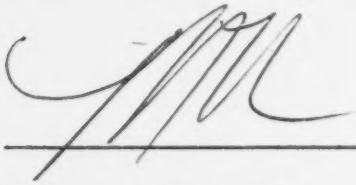
of his constitutional rights as guaranteed to him by the Fourteenth Amendment" and as explicitedly set forth in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)

CONCLUSION AND PRAYER

The Fourteenth Amendment right to due process of law is a fundamental right, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed by the trial court's jury charge. Review should be granted, and upon review, this case should be remanded for trial in accordance with those issues discussed here.

This the 22nd day of December, 1987.

Respectfully submitted,



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Attorney for Petitioner

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.3 of the Rules of this Court three copies of this petition for writ of certiorari were served on counsel for the opposing party, by placing them in the United States mail, first class

postage prepaid, addressed as follows:

Mr. Philip M. Goldstein
Assistant Solicitor
State Court of Cobb County
Post Office Box 649
Marietta, Georgia 30061

This the 22nd day of December, 1987.

MELVIN S. NASH
Attorney for Petitioner

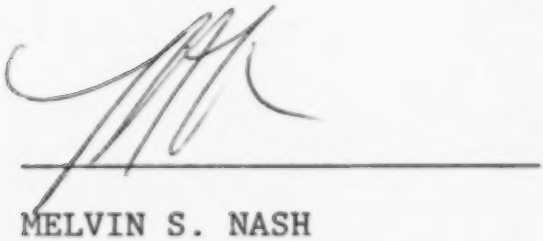
CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.4(c) of the Rules of this Court, and given that 28 U.S.C. § 451 may be appli-

cable, three copies of this petition for writ of certiorari were served on the Attorney General of the State of Georgia, by placing them in the United States mail, first class postage prepaid, addressed as follows:

Office of the Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

This the 22nd day of December, 1987.



MELVIN S. NASH
Attorney for Petitioner

APPENDIX

In the Court of Appeals of Georgia

74773. PENDLETON v. THE STATE

(D-133)

DEEN, Presiding Judge.

During the early morning hours of January 8, 1986, a Cobb County police officer observed the vehicle driven by the appellant, Walter Pendleton, cross over the lane marks several times and change lanes twice without giving signals. The officer stopped the vehicle and, after noticing a strong odor of alcohol about Pendleton, administered a series of field sobriety tests, including an alconsensor, to Pendleton. Having failed these tests, Pendleton was then placed under arrest and transported to the station; shortly afterwards, an

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intoximeter test indicated a blood alcohol content of .20 percent. He was charged, tried, and convicted of driving under the influence, driving with a blood alcohol content of .12 or greater, and failure to maintain a proper lane. The trial court merged the two driving under the influence counts and sentenced Pendleton to serve 12 months' imprisonment, followed by 12 months' probation, and to pay a $1000 fine.

1. Pivotal to this appeal are three jury instructions given by the trial court. (1) After instructing the jury on the presumptions concerning blood alcohol content contained in OCGA § 40-6-392(b)(1)-(3), the trial court then informed the jury that no presumption was involved if it found that

Pendleton's blood alcohol content was .12 percent or greater; rather, in such a circumstance, the jury would have to find him guilty of driving with an unlawful blood alcohol content. (2) The trial court also charged that impaired driving ability is not a factor necessary to constitute a violation of OCGA § 40-6-391(a)(4). (3) Lastly, the trial court instructed the jury that "the alconsensor is used as an initial screening device to aid the police officer. It is not the state administered test the police officers ask the defendant to take. Further, the test results as to the alconsensor are given in the form of positive or negative."

Trial counsel for the appellant neither objected to nor made

reservations about these instructions, in response to the trial court's specific inquiry, and any objections were consequently waived. Harper v. State, 180 Ga. App. 20 (348 SE2d 318) (1986). Nevertheless, present counsel for the appellant contends that these jury instructions were bad, and that the trial counsel's failure to object demonstrated his ineffective assistance.

Concerning the main charge on blood alcohol content, notwithstanding this court's previous approval of essentially the same instruction in Turrentine v. State, 176 Ga. App. 145 (2) (355 SE2d 630) (1985), the appellant asserts that this charge (1) violates the constitutional principle that the jury shall be the judges of the law and the facts; (2)

is inconsistent and conflicting, not to mention improper and insufficient; and (3) was impermissibly confusing to the jurors. He contends that the charge on impaired driving ability, although taken directly from Lester v. State, 253 Ga. 235, 237 (320 SE2d 142) (1984), in effect instructed the jury to presume the defendant's blood alcohol level if the state was unable to establish this fact, and was impermissibly burden-shifting. Further, in the appellant's mind, the charge on the alconsensor was an impermissible comment on the evidence.

These contentions make little sense, and have even less merit. The jury charges were correct statements of law and fit the evidence, and the failure of the appellant's trial counsel to

assert frivolous objections to these charges certainly did not demonstrate ineffective assistance of counsel.

2. On the morning of (but prior to) the trial, the state disclosed to the appellant its intention to submit evidence of two prior convictions for driving under the influence in aggravation of sentencing. The sole objection raised during the actual sentencing hearing was that one of the prior convictions was too stale to consider. The appellant now contends that the trial court erred in considering the prior convictions because (1) the state did not comply with Rule 31.1 of the Uniform Rules of State Court, and (2) the state failed to show that the appellant either was represented by counsel or validly

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waived representation at the times of the prior convictions. These present objections were waived by the appellant's trial counsel, see McDuffie v. Jones, 248 Ga. 544 (283 SE2d 601) (1981), but for the edification of the appellant's present counsel it should be noted that Rule 31.1 of the Uniform Rules of State Court has nothing to do with tendering evidence in aggravation of sentencing.[1]

---

[1]The appellant's counsel's contention that the state did not comply with the Uniform Rules of State Court is not merely incorrect; rather, it illustrates the difficulty of practicing what one preaches. Despite being granted two extensions of time to prepare a brief and enumeration of errors in this essentially frivolous appeal, the brief eventually filed by counsel was lengthy, disorganized, and violative of Rule 11 (a) of the Rules of the Court of Appeals.

The state was not even required to give pre-trial notice of its intention to present the prior convictions at the sentencing stage. Whisenhunt v. State, 172 Ga. App. 742 (324 SE2d 570) (1984).

3. There is no merit to the appellant's contention that he was denied a fair trial because it was discovered after the trial that one of the bailiffs was the step-father of the state's main witness, and this relationship conflicted with the bailiff's duty not to communicate with the jury. First of all, the witness in question was hardly the state's main witness; he was merely the police officer who had served as back-up to the arresting officer, and who did not even appear on the scene until the appellant had been arrested. Secondly,

there is no substantiation whatsoever of the allegation of a familial relationship between the witness and the bailiff. Lastly, it is only where a communication from the bailiff to the jury is shown that the state must rebut a presumed harm, and in this case there was not even an allegation, much less a showing, of any communication. See Mercer v. State, 169 Ga. App. 723 (314 SE2d 729) (1984).

4. The appellant contends that the sentence imposed by the trial court was excessive when compared to the punishment received by others convicted of like offenses. OCGA §§ 17-10-1 and 17-10-2 allow a trial court to sentence a defendant to any amount of time within the limits provided by the legislature.

See Hiers v. State, 179 Ga. App. 181 (345 SE2d 900) (1986). The sentence in this case was within the statutory limits, and any complaints regarding the sentence should have been addressed to the appropriate sentence review panel. Hammond v. State, 157 Ga. App. 647 (278 SE2d 188) (1981).

5. The appellant also contends that the verdict is contrary to law because the trial court failed to charge the jury on intent; that the verdict is contrary to the evidence because of improperly admitted evidence; and that the verdict is contrary to the weight of the evidence. To reject the first "contrary," we need only point out that the trial court did charge on intent. We are unable to discern any merit in the

second "contrary" because, rather than specifying what evidence was improperly admitted, the appellant merely quotes testimony from the hearing on the motion for new trial criticizing the jury instructions. Concerning the third "contrary," the evidence was sufficient to authorize a rational trier of fact to find the appellant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). Thus, contrary to the appellant's contentions, the verdict is not infirm.

Judgment affirmed. Birdsong, C. J., and Pope, J., concur.

COURT OF APPEALS

OF THE STATE OF GEORGIA

Atlanta, September 29, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

74773. Walter K. Pendleton v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(Victoria McLaughlin)

CLERK

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta (Oct 28, 1987)

Case No. 45116. Pendleton v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1056

In The

Supreme Court of the United States

October Term, 1987

WALTER K. PENDLETON,

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STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to review Petitioner's constitutional challenge to O.C.G.A. § 40-6-392(b)(4) and a jury charge related thereto where this issue was not properly raised, presented or decided by the courts below?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On January 8, 1986, at approximately 2:11 a.m., Petitioner Walter Pendleton was stopped and cited by officer Frank Baker of the Cobb County, Georgia, "D.U.I." task force for the offenses of driving a motor vehicle while under the influence of alcohol, driving with an unlawful blood-alcohol level and failure to

maintain a proper lane while driving. (R. 3-6, 11-12; T. 50, 52-55, 57-58). Despite the strong odor of alcohol exuding from the Petitioner's vehicle, the Petitioner had denied drinking any alcoholic beverage at all. (T. 58-60).

Officer Baker administered a series of field sobriety tests, all of which the Petitioner "failed" by giving indications of being under the influence of alcohol. (T. 59-61, 64-67, 68-70, 87-89). Included as one of those tests was an "alcosensor" breath analysis test, which indicated a positive result for alcohol. (T. 66-70, 81-83). After agreeing to a chemical analysis of his blood-alcohol content pursuant to the Georgia implied consent statute (T. 71, 75-79), the intoxication test was administered and showed a blood-alcohol content of .20 grams percent, an amount over the Georgia legal limit for driving. (T. 138-40, 143, 145-46).

The Petitioner, through his defense witness, claimed that he had swerved from his driving lane in order to avoid a manhole cover or a pot hole in the road. (T. 150-52, 157-58). The Petitioner's witness admitted that Petitioner had been drinking at a nearby nightclub prior to his driving of the vehicle (T. 169-70).

The trial jury convicted the Petitioner of all three offenses (R. 25; T. 29[illegible] and the trial court recognized that the Petitioner's convictions for driving under the influence and driving with an unlawful blood-alcohol level merged as a matter of Georgia law. (T. 297). The Petitioner was thereafter sentenced to twelve months imprisonment, twelve months consecutive probation and a fine of $1,000.00 for his two convictions. (R. 28; T. 309-11).

On September 8, 1987, the Court of Appeals of Georgia affirmed the Petitioner's convictions and sentences. *Pendleton v. State,* 184 Ga. App. 358, ___ S.E.2d ___ (1987). Rehearing was denied by that court on September 29, 1987, and the Supreme Court of Georgia denied the Petitioner a writ of certiorari on October 28, 1987.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DECLINE TO GRANT A WRIT OF CERTIORARI BECAUSE THE ISSUE PRESENTED IN THIS CASE WAS NOT RAISED, PROPERLY PRESENTED OR DECIDED BY THE GEORGIA COURTS.

Petitioner Walter K. Pendleton alleges in this application that O.C.G.A. § 40-6-392(b)(4), the Georgia statute regarding driving under the influence and the level of blood-alcohol content, is unconstitutionally burden-shifting under the guidelines of the Fourteenth Amendment and this Court's decision in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Respondent submits that this issue was not properly raised or presented to the Court of Appeals of Georgia and that the Court of

Appeals of Georgia did not address this issue in its decision regarding the Petitioner's direct appeal. As such, this issue is improperly presented to this Court for review anad presents no basis for the granting of a writ of certiorari.

On direct appeal the Petitioner raised as his eighth enumeration of error a challenge to a portion of the trial court's charge which, in accordance with O.C.G.A. § 40-6-392(b)(4), stated that if the jury found that a driver had a blood-alcohol content of .12 grams percent, that established a per se violation of Georgia law. (*See* T. 281). The Petitioner maintained that this charge, along with two other portions of the trial court's charge, was:

> [I]mproper as they were confusing to the jurors; furthermore, these charges attempted to discount or explain the evidence presented to the jury by the [Petitioner]. As a result, the charges impermissibly prejudiced the [Petitioner] and presents the issue of whether the conviction entered below is a valid conviction of a court of this state.

(Petitioner's brief on direct appeal, p.4.)

The Petitioner also argued to the Court of Appeals of Georgia that the charge conflicted with the Georgia constitution and with the Georgia statutory provisions providing for the jury to be both the judge of the facts and law presented at trial. *Id.* at 21. The Petitioner argued that the charge was inconsistent and conflicting, that the charge was not sufficiently clear to avoid confusing the jury and therefore did not meet the standard for proper jury charges. *Id.*

The Petitioner did not argue to the Court of Appeals of Georgia that this particular portion of the

charge was unconstitutionally burden-shifting under the guidelines of either the Fourteenth Amendment or this Court's decision in *Sandstrom v. Montana,* 442 U.S. 510 (1979).

Only in conjunction with his ninth enumeration of error, a challenge to the trial court's charge that "impaired driving ability is not a factor necessary to constitute the crime alleged in count two (of the indictment)," did the Petitioner raise a claim of a burden-shifting charge. *Id.* at 21. Regarding that particular challenge, the Petitioner argued that the charge instructed the jury to disregard other evidence of the Petitioner's driving ability and claimed that that portion of the charge permitted the jury to "presume the [Petitioner's] blood-alcohol level if the State was unable to establish this fact." *Id.* However, this portion of the Petitioner's brief also raised no constitutional challenge to O.C.G.A. § 40-6-392(b)(4).

Even in the Petitioner's motion for rehearing before the Court of Appeals of Georgia, the Petitioner still challenged only the trial court's charge to the jury and not any attack upon the statute, as apparently presented in the instant petition.

In addressing these allegations on direct appeal, the Court of Appeals of Georgia summarized the Petitioner's challenges to the trial court's charge, none of which included a claim that the charge itself was impermissibly burden-shifting. *See Pendleton v. State,* 184 Ga. App. at 359(1). As such, the Court of Appeals of Georgia was not presented with the same issue raised in the instant petition for writ of certiorari and has accordingly not presented any ruling based upon this issue.

As this Court has recognized, the Court will not decide federal constitutional issues raised for the first time on a petition for writ of certiorari seeking review of state court decisions. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). Additionally, where there is a strong possibility, in light of Georgia law, that the state court decision might have rested on a nonfederal ground, this Court has found that there is no jurisdiction for the granting of a writ of certiorari. *Stembridge v. Georgia,* 343 U.S. 541, 543 (1952). *See also Beck v. Washington,* 369 U.S. 541, 550-54 (1962). Finally, even if a claim is raised in a motion for rehearing before a state's highest court, that issue is raised too late for consideration by this Court absent a showing that the state court then addressed the newly raised claim on its merits. *See Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935).

Respondent submits that the question presented in the instant petition for a writ of certiorari was not properly raised either in the Petitioner's brief or his motion for rehearing before the Court of Appeals of Georgia, and as such presents this Court with an issue raised for the first time by this Petitioner. As such, Respondent urges this Court to reject the Petitioner's requests for review in this case.

Finally, assuming *arguendo* that this issue could have been raised and addressed by the Court of Appeals of Georgia, both the Supreme Court of Georgia and the Court of Appeals of Georgia have previously and properly rejected this identical claim of a constitutional violation. *Lester v. State,* 253 Ga. 235, 237-38(2), 320

S.E.2d 142 (1984); *Turrentine v. State,* 176 Ga. App. 145, 147-48(2), 335 S.E.2d 630 (1985). As such, where the issue raised in the instant case was properly presented to the Georgia courts in those other cases, these allegations were properly determined to be without merit.

Accordingly, for all of the above and foregoing reasons, Respondent asserts that the Petitioner has failed to present any substantive issue law which would warrant review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with applicable decisions of this Court.

Respectfully submitted,

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PETITIONER'S BRIEF IN REPLY THAT A CONSTITUTIONAL CHALLENGE TO THE JURY CHARGE WAS PROPERLY RAISED IN THE COURTS BELOW

The Court of Appeals of Georgia specifically addressed the federal constitutional issue Petitioner seeks to have this Court review on writ of certiorari.

In Pendleton v. State, 184 Ga.App. 358, 361 S.E.2d 663(1987), at 664 the Court of Appeals held that "pivotal to this appeal are three jury instructions given by the trial court" and states, in pertinent part:

"Concerning the main charge on blood alcohol content, notwithstanding this court's previous approval of essentially the same instruction in Turrentine v. State, 176 Ga.App. 145(2), 335 S.E.2d 630 (1985), the appellant asserts that this charge (1) **violates the constitutional principle that the jury shall be the judges of the law and the facts**; (2) is inconsistent and conflicting, not to mention improper and insufficient; and (3) was impermissibly confusing to the jurors. **He contends that the charge on impaired driving ability, although taken directly from Lester v. State, 253 Ga. 235, 237, 320 S.E.2d 142 (1984), in effect instructed the jury to presume the defendant's**

blood alcohol level if the state was unable to establish this fact, and was impermissibly burden-shifting."

(emphasis added)

Although the appellant's brief in the Court of Appeals was lacking to some extent in clearness the Court of Appeals had no problem perceiving the constitutional issue raised by the appellant in his brief. A review of the cases the Court of Appeals cites in it's decision, Lester and Turrentine, clearly shows that those cases are inextricably opinioned on the constitutional due process issue of impermissible presumptions of guilt raised by this appeal. Additionally, the appellee uses these same cases in it's brief at pages 6-7 to

rebut the constitutional issues raised by this appellant.

The Court of Appeals of Georgia makes mention of the fact that trial counsel for the appellant neither objected to nor made reservations about these instructions, in response to the trial court's specific inquiry, and any objections were consequently waived. However, the controlling authority in Georgia is O.C.G.A. § 5-5-24 (originally § 70-207 of the 1968 official code of Georgia) which provides that a defendant in a criminal case may appeal and enumerate error on an erroneous charge without first raising the issue in the trial court.

In this case, an independent examination of state law shows that the state court did not follow any well-established procedural rule, and made an ad hoc determination operating discriminatorily against this particular litigant.

A reading of the holding in Harper v. State, 180 Ga.App. 20, 348 S.E.2d 318 (1986) cited by the Court of Appeals of Georgia reveals that it is based upon reasoning contained in Jackson v. State, 246 Ga. 459, 271 S.E.2d 855 (1980).

In Jackson, supra at page 459, the trial court **omitted** a charge on impeachment by evidence of prior felony convictions, the defendant did not request a charge on impeachment, and when asked at

the conclusion of the charge if there were any exceptions to the charge, defense counsel replied "none".

By comparison, in this case, the trial court included in it's charge to the jury the instruction allegedly waived.

There is a distinction between failure to request a charge on some collateral issue in the case and to object to omission thereof from the charge, on the one hand, and failure to object to the charge of the court as given, on the other hand. Thomas v. State, 234 Ga. 615, 618, 216 S.E.2d 859 (1975). Failure to request a charge on a collateral issue or failure to object to an omission to charge have precluded appellate

review of the issue, but failure to object to the charges given has fallen within O.C.G.A. § 5-5-24. White v. State, 243 Ga. 250, 253 S.E.2d 694 (1979).

In essence, the procedural requirement imposed by the Court of Appeals constitutes a novel approach to Georgia procedural law given that no previous state case has given notice of the existence of any such requirement. Novelty in procedural requirements, cannot be permitted to thwart review in the United States Supreme Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. See Wright v. Georgia,

373 U.S. 284, 83 S.Ct. 1240 (1963) and NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302 (1964).

In the case at bar, the trial counsel's failure to object to the jury instruction does not constitute an "adequate state ground" for the state court's denial of relief so as to preclude the United States Supreme Court from reviewing the federal constitutional question which was also involved in the litigation before the state court.

Additionally, appellant respectfully submits that the state court has misapplied the decision of Turrentine v. State, supra and, Lester v. State, supra and, as more thoroughly set out in appellant's original brief as incorporated

herein, overlooked the fact that the trial court's charge to the jury on the effect of a finding of a blood alcohol reading of .12 or more created a constitutionally impermissible presumption of guilt in violation of this Court's holdings of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

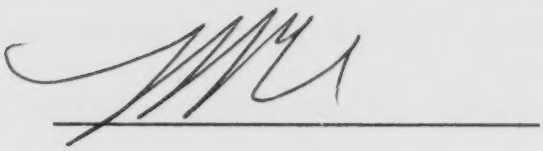
CONCLUSION AND PRAYER

The Fourteenth Amendment right to due process of law is a fundamental right, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed

by the trial court's jury charge. Review should be granted, and upon review, this case should be remanded for trial in accordance with those issues discussed here.

This the 3rd day of January, 1988.

Respectfully submitted,



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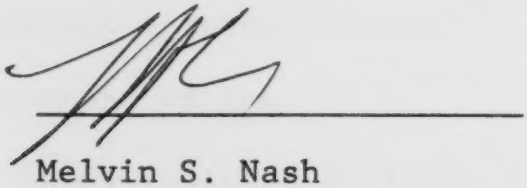
CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.3 of the Rules of this Court three copies of this Reply to respondents brief in opposition to the petition for writ of certiorari were served on counsel for the opposing party, by placing them in the United States mail, first class postage prepaid, addressed as follows:

Mr. Philip M. Goldstein
Assistant Solicitor
State Court of Cobb County
Post Office Box 649
Marietta, Georgia 30061

This the 3rd day of January, 1988.



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Dennis R. Dunn

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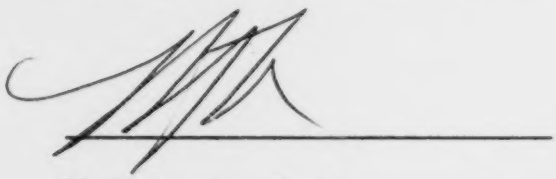

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